

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DANIEL W. KAPETAN,

Petitioner,

vs.

JAMES COX, *et al.*,

Respondents.

3:11-cv-00282-RCJ-VPC

ORDER

This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, by a Nevada state prisoner. Several motions are pending before the Court.

Respondents filed a motion to dismiss the petition on September 29, 2011, in which they argued, among other things, that some claims in the petition were unexhausted. (ECF No. 18). Petitioner filed a response to the motion to dismiss and a motion to amend the petition. (ECF No. 27 & 28). In that document, petitioner states that he wishes to file an amended petition that includes only unexhausted claims. (*Id.*, at p. 9). On October 25, 2011, respondents filed a statement of non-opposition to petitioner's motion to file an amended petition. (ECF No. 30). Petitioner filed an amended petition on January 17, 2012. (ECF No. 37).

A party may amend a pleading once as a matter of course if the pleading either 21 days after serving it, or if the pleading is one to which a responsive pleading required, 21 days after service of such motion. Fed. R. Civ. P. 15(a)(1) (A), (B). "In all other cases, a party may amend its pleading

1 only the with the opposing party's written consent or the court's leave. The court should freely grant
2 leave when justice so requires." Fed. R. Civ. P. 15(a)(2). In the instant case, the Court grants
3 petitioner's motion for leave to file an amended petition. This action shall proceed on the amended
4 petition. (ECF No. 37). Respondents' motion to dismiss the original petition is denied as moot.
5 Respondents will be given the opportunity to file a responsive pleading to the amended petition, as
6 specified at the conclusion of this order.

7 On January 12, 2012, respondents filed a motion that Brian E. Williams, Jr. be substituted for
8 and in place of respondent James Cox, because Williams has succeeded Cox as warden of Southern
9 Desert Correctional Center. (ECF No. 35). Pursuant to Fed. R. Civ. P. 25(d), respondents' motion
10 to substitute Williams in place of Cox is granted.

11 Petitioner filed a motion a writ of habeas corpus regarding his original petition. (ECF No.
12 17). Petitioner has filed a motion for judgment on the pleadings regarding his amended petition, as
13 well as a motion to change the name of the motion to a motion for summary judgment. (ECF Nos.
14 46 & 47). Each of these motions are denied, as a petition for a writ of habeas corpus cannot be
15 granted on default. *Gordon v. Duran*, 895 F.2d 610, 612 (9th Cir. 1990).

16 Petitioner has filed two motions to expedite a decision in this action. (ECF Nos. 42 & 43).
17 Petitioner's motions are now denied as moot.

18 **IT IS THEREFORE ORDERED** that respondents' motion to dismiss the petition (ECF No.
19 18) is **DENIED AS MOOT**.

20 **IT IS FURTHER ORDERED** that petitioner's motion to file an amended petition (ECF No.
21 27) is **GRANTED**, and this action **SHALL PROCEED** on the amended petition (ECF No. 37).

22 **IT IS FURTHER ORDERED** that respondents' motion to strike the amended petition (ECF
23 No. 40) is **DENIED**.

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